

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DARNELL J. NELSON,

Plaintiff,

V.

MARK W. EVERSON, *et al.*,

Defendants.

Case No. C07-0707RSL

ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

This matter comes before the Court on a motion to dismiss (Dkt. #6) filed by defendants. Plaintiff is proceeding *pro se*. He alleges that the defendants, who are the Commissioner and three managers of his employer, the Internal Revenue Service (“IRS”), discriminated against based on his race and disabilities, denied him accommodations, subjected him to a hostile work environment, and retaliated against him. Plaintiff asserts claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, 29 U.S.C. § 701; and 42 U.S.C. §§ 1981 and 1981(a). Defendants move to dismiss pursuant to Federal Rules of Civil Procedure

1 12(b)(1) and 12(b)(6).

2 **II. ANALYSIS**

3 **A. Background Facts.**

4 Plaintiff has served as an estate tax attorney for the IRS for over 28 years.

5 Plaintiff alleges that he has numerous physical impairments that substantially limit his
6 ability to perform a variety of functions.

7 Plaintiff alleges that on September 5, 2006, he was required to undergo a
8 performance improvement period (“PIP”) for what the agency claimed was unacceptable
9 performance. Plaintiff argues that his performance was acceptable. Plaintiff has filed
10 complaints and addenda thereto with the Equal Employment Opportunity (“EEO”) office
11 on February 2, 2003, March 13, 2006, October 12, 2006 and February 16, 2007.

12 In February 2004, plaintiff filed a lawsuit with this Court against the Treasury
13 Department and certain individual employees alleging discrimination and failure to
14 accommodate his alleged disabilities. Nelson v. Snow, C04-349RSL (W.D. Wash. 2004)
15 (“Nelson I”). The Court dismissed all of plaintiff’s claims in Nelson I, and plaintiff is
16 currently appealing those orders.

17 Plaintiff initiated his most recent EEO complaint on January 4, 2007. The
18 complaint was made formal on February 16, 2007 and alleged hostile work environment,
19 retaliation, and misconduct by Carolyn Tucker and Charles Morris. On March 16, 2007,
20 Morris issued a notice of proposed action to remove plaintiff from his IRS employment at
21 any time after April 19, 2007.

22 **B. Dismissal.**

23 In evaluating a Rule 12(b) motion, the complaint should be liberally construed in
24 favor of the plaintiff and its factual allegations taken as true. See, e.g., Oscar v. Univ.

1 Students Co-Operative Ass'n, 965 F.2d 783, 785 (9th Cir. 1992). Plaintiff has not
 2 responded to or opposed this motion, which the Court considers to be an admission that
 3 the motion has merit. Local Rule 7(b)(2).

4 As an initial matter, plaintiff has brought claims against various individual
 5 employees, but the head of the agency is the only proper defendant for federal workplace
 6 discrimination claims. See, e.g., Johnston v. Horne, 875 F.2d 1415, 1419-20 (9th Cir.
 7 1989) (explaining that the agency head was the only proper defendant for discrimination
 8 claims under the Rehabilitation Act and Title VII). For plaintiff's discrimination claims
 9 in this case, the only possible properly named defendant is Mark Everson, the
 10 Commissioner of the IRS. Plaintiff, however, has not served Everson. In fact, he has
 11 served only defendant Aileen Condon with the motion, but failed to serve her with a copy
 12 of the complaint as required by the Federal Rules of Civil Procedure. Because plaintiff
 13 has not properly served any of the defendants, this Court lacks jurisdiction.

14 Even if the Court had jurisdiction, dismissal would be warranted under Rule
 15 12(b)(6). Plaintiff asserts claims under 42 U.S.C. §§ 1981 and 1981(a). As the Court
 16 explained when it dismissed plaintiff's Section 1981 claims in Nelson I, the majority of
 17 courts have barred Section 1981 suits against the government. See Section 1981(c): "The
 18 rights protected by this section are protected against impairment by *nongovernmental*
 19 discrimination and impairment *under color of state law*." (emphasis added).¹

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21 ¹ See also Holloway v. Bentsen, 870 F. Supp. 898 (N.D. Ind. 1994) (granting
 22 motion to dismiss IRS employee's Section 1981 claims against her supervisors finding
 23 that, as a matter of law, she could not proceed with an employment discrimination
 24 complaint against other federal employees in their individual capacities); see also Davis-
Warren Auctioneers, J.V. v. FDIC, 215 F.3d 1159 (10th Cir. 2000) ("We join the Seventh
 25 and Eleventh Circuits in holding that § 1981 is inapplicable to alleged discrimination
 under color of federal law. The language of § 1981(c) could hardly be more clear");

In addition, plaintiff has not exhausted his administrative remedies, which is a prerequisite to suit under Title VII and the Rehabilitation Act. See, e.g., Vinieratos v. United States Dep’t of Air Force ex rel. Aldridge, 939 F.2d 762, 769 (9th Cir. 1991). The scope of a civil action alleging employment discrimination is limited by the charge filed with the EEOC. See, e.g., Albano v. Schering-Plough Corp., 912 F.2d 384, 386 (9th Cir. 1990). The failure to administratively allege a discrimination claim bars the claim. Brown v. GSA, 425 U.S. 820, 832 (1976). Plaintiff has not filed copies of his EEOC complaints or described the contents thereof. The Court will not assume that plaintiff’s current allegations are raised in those complaints.

10 Furthermore, among other requirements, a plaintiff may initiate a civil action only
11 if he or she has waited a minimum of 180 days from the date of his or her EEO complaint
12 before filing suit in district court. 29 C.F.R. § 1614.407. Plaintiff filed his formal EEO
13 complaint on February 16, 2007 and filed this lawsuit on May 7, 2007. He did not wait
14 the requisite amount of time. Similarly, a claim must be raised administratively within
15 forty-five days of the alleged retaliatory event. 29 C.F.R. § 1614.105(a)(1). Although
16 plaintiff alleges that the notice of proposed action to remove him from his employment
17 was retaliatory, there is no evidence that he raised that allegation with the EEOC.
18 Accordingly, plaintiff has failed to exhaust his administrative remedies.

III. CONCLUSION

20 For all of the foregoing reasons, the Court GRANTS defendants' motion to
21 dismiss (Dkt. #6) and dismisses plaintiff's claims against defendants without prejudice.
22 The Clerk of the Court is directed to enter judgment in favor of defendants and against

²⁴ Espinueva v. Garrett, 895 F.2d 1164, 1165 (7th Cir. 1990) (“Section 1981 does not apply to employment discrimination cases involving the federal government”).

1 plaintiff.

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3 DATED this 29th day of June, 2007.

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6 Robert S. Lasnik
7 United States District Judge

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